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In re: WTTT(FM), Stratford, NH
Facility ID 166038
File Nos. BMPH-20110316AAK
BL-20110323ABV

**Request for Reinstatement and Tolling
Petition for Reconsideration**

Dear Messrs. Fitch and Lunderville:

The Media Bureau, Audio Division (“Bureau”) has for consideration a May 7, 2012, request (“Request”) filed by Silver Fish Broadcasting, Inc. (“SFB”) licensee of WTTT(FM), Stratford, New Hampshire, as supplemented on June 7, 2012, and October 24, 2012. SFB “requests that it be exempt from automatic expiration of the station’s license pursuant to [S]ection 312(g) [of the Communications Act (“Act”)] or in the alternative that its underlying construction permit be tolled pursuant to rule 73.3598(b)(2).”¹ For the reasons discussed below we deny the Request and dismiss a related Petition for Reconsideration by White Mountains Broadcasting, LLC (“WM”) as moot.

Background. The Bureau granted the original WTTT construction permit on May 25, 2006, for a three-year period expiring May 25, 2009. SFB acquired the permit through assignment shortly before expiration. Pursuant to a policy then in effect, SFB received an additional 18-month construction period as an “eligible entity,” bringing the construction deadline to March 24, 2011.² SFB filed an application to modify the original construction permit on March 16, 2011, and the Commission granted the application on March 17, 2011 (“March Permit”). SFB constructed pursuant to the March Permit and filed a license application on March 23, 2011. The Bureau licensed the station on April 6, 2011. However, SFB took the station off the air on April 7, 2011, when it received a Petition for Reconsideration (“Petition”) from

¹ Request at 1 (referencing 47 U.S.C. § 312(g) and 47 C.F.R. § 3598(b)(2)).

² See 47 C.F.R. § 73.3598(a). See also, *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) (vacating eligible entity definition).

WM.³ WM asked the Bureau to rescind the license grant and to cancel the March Permit because the facilities authorized therein allegedly do not provide the requisite city grade coverage over Stratford, WTTT's community of license.⁴

On May 3, 2011, SFB requested special temporary authority ("STA") to remain silent, which the Bureau granted. Section 312(g) of the Act provides for termination of broadcast licenses upon one year of discontinued operation.⁵ That provision encourages broadcast service to the public and discourages spectrum hoarding. In granting the STA, the Bureau warned SFB that WTTT's license would cancel automatically if the station did not resume broadcast operations prior to one year of silence.

On June 2, 2011, SFB filed an application to modify the authorization by moving to a higher elevation on the same parcel of land. The Bureau approved the modification and issued a construction permit on June 24, 2011 ("June Permit"). Condition 4 of the Permit reiterated that the Permit would expire automatically along with the underlying license if the station had not resumed operations by April 2012, notwithstanding the Permit's nominal June 24, 2014, expiration date.

On November 22, 2011, the site owner advised SFB that he would be vacating the property as of December 9, 2011 because his bank had foreclosed and planned to sell the property at auction. SFB states that it had to remove its equipment by that same December 9, 2011, date because it otherwise stood to lose the equipment when the property was auctioned. SFB never resumed operations. Accordingly on the one-year anniversary of the station's silence, April 7, 2012, the WTTT license and all associated authorizations, including the June Permit, expired as a matter of law.

On May 7, 2012, SFB timely filed its Request to reinstate the license. SFB argues that reinstatement is appropriate because WM's Petition against the March Permit and WTTT license remains unresolved. It notes that Section 312(g) contains language allowing for reinstatement if the licensee prevails in an administrative or judicial appeal. SFB also observes that the Commission's Rules "toll" the running of broadcast construction periods if grant of the underlying construction permit is subject to administrative review.⁶ SFB argues that "just as it is unreasonable to require a permittee to construct and operate a station while its authorization is challenged, it is likewise unreasonable to expect a licensee to incur the cost and expense of operating the station and building a business when it has no assurance of the ongoing viability of its license or underlying construction permit."⁷ With respect to the prospect of constructing and returning to the air, SFB states that it has contacted the landowners who purchased the property at auction and determined that they are amenable to entering into a lease with SFB. SFB states, however, that it would not be possible to negotiate such a lease unless the Commission first rules that the station has a valid license.

Discussion. As an initial matter, we observe that the principle of tolling, which SFB raises as an alternative theory, is inapplicable to this case. The Commission tolls broadcast construction deadlines to afford each permittee an unencumbered three-year period in which to build and file a license application.

³ WM is the licensee of nearby station WOXX(FM) (formerly WUKV), Colebrook, New Hampshire. The Commission received WM's Petition on April 13, 2011.

⁴ The parties dispute whether the station's community of license is the Village of Stratford or the larger Town of Stratford and whether an area known as North Stratford is part of the community of license.

⁵ 47 U.S.C. § 312(g).

⁶ Section 73.3598(b)(2).

⁷ Request at 1.

Once a permittee builds the permitted facilities and files a complete license application, as SFB did on March 23, 2011, it has met its construction deadline and the concept of tolling is no longer relevant.⁸ The standard governing the amount of time that a licensed station can remain silent is Section 312(g) of the Act, which limits periods of silence to twelve consecutive months but gives the Commission discretion to reinstate terminated licenses if the licensee “prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.”⁹

We reject SFB’s overly broad reading of Section 312(g) which would permit extended periods of silence whenever any petition or objection is filed against any application. The “prevails in an administrative or judicial appeal” rationale is listed as an illustrative example of a “reason to promote equity and fairness.” It is our practice to resolve questions of equity and fairness by conducting a case-by-case analysis of the circumstances that led to the particular station’s extended silence.¹⁰ The Commission has exercised its authority to reinstate in only a few cases, each of which involved silence for compelling reasons beyond the licensee’s control.¹¹

In this case the WM Petition did not in any way impede SFB from continuing operations with its licensed facilities. Rather, SFB made a business decision to go dark, deactivating WTTT voluntarily on April 7, 2011, primarily for financial reasons. Specifically: (1) the pending Petition made it difficult for WTTT to enter into long term sales contracts; (2) SFB had identified a site from which it could increase its coverage; and (3) it wanted to remain off air until it could improve its listener base.¹² SFB’s financial focus continues. It justifies the station’s continued silence because SFB would otherwise “incur the cost and expense of operating the station and building a business when it has no assurance” of the outcome of the challenge by WM.¹³ There is no requirement for a licensed station to cease operations when facing a challenge concerning community coverage requirements, and WTTT’s silence on that basis was entirely avoidable.¹⁴ The Commission has declined to reinstate licenses where, as here, failure to return a station

⁸ The Commission cannot as SFB suggests use its tolling rules to prevent the statutory one-year period of silence from running or to undo the forfeiture of WTTT’s authorizations for exceeding that statutory period. Moreover, tolling is inapplicable if a station has received more than three unencumbered years to build. *JNE Investments, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 623 n.50 (2008) citing *Texas Grace Communications*, Memorandum Opinion and Order, 20 FCC Rcd 4820, 4824 (2005). WTTT’s original construction permit was outstanding for four and a half years because SFB received additional time as an eligible entity. If SFB is asking for tolling of the forfeited June Permit, which modified the WTTT license, we would not be able to consider such a request without first determining that there are grounds to reinstate the license.

⁹ 47 U.S.C. § 312(g). The law provides additional grounds to reinstate certain authorizations for stations located in Alaska.

¹⁰ See *Eagle Broadcasting Group, Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 600 (2008).

¹¹ See, e.g., *V.I. Stereo Communications Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (“*V.I. Stereo*”) (station’s silence attributable to destruction of towers in hurricane and substantial damage to subsequently rebuilt towers in additional hurricanes); *Harry Martin, Esq.*, Letter, 23 FCC Rcd 15012, 15014 (MB 2008) (licensee took all steps needed to return to air from replacement site prior to 12 months of silence but nevertheless remained off air to promote air safety after discovering and diligently reporting that FCC and FAA records contained incorrect tower information for which it was not responsible); *Mark Chapman, Court-Appointed Agent*, Letter, 22 FCC Rcd 6578 (MB 2007) (extended silence resulting from licensee’s compliance with a court order).

¹² See File No. BLSTA-20110503ACN, Exhibit 1.

¹³ Request at 1.

¹⁴ See *John Wells King, Esq.*, 25 FCC Rcd 12812, 12814 (MB 2010) (reinstatement unwarranted and voluntary deactivation of FM translator station avoidable where station arguably went silent to prevent potential interference to yet unbuilt, new station but the Rules do not require cessation of operations absent actual interference).

to the air was due to the licensee's own actions, finances, and/or business judgments.¹⁵ Accordingly, we find that the WM Petition does not fall within the scope of Section 312(g) and decline to reinstate the license on the basis of the "administrative or judicial appeal" language.¹⁶

Finally, we consider whether the loss of the site specified in the WTTT license and June Permit on December 9, 2011, is sufficient to warrant the exercise of our authority under Section 312(g) to reinstate the WTTT license. We will assume *arguendo* that SFB did not contribute to the circumstances which led to the foreclosure and that it was necessary for SFB to remove its equipment to avoid its loss at auction. Having examined the entire record, we find that the involuntary site loss does not create equities sufficient to justify license reinstatement. Specifically, the foreclosure was not a direct cause of WTTT's extended silence and, at most, an incidental reason.¹⁷ As discussed above, the primary reason for WTTT's lengthy off-air status was SFB's business decision to cease operations during the pendency of the WM Petition. There is no evidence that SFB would have reactivated the station prior to 12 months of silence, absent the foreclosure.¹⁸ For example, the record contains no documentation of any steps to construct pursuant to the June Permit in the five months between permit grant on June 24, 2011 and foreclosure notification on November 22, 2011. Nor did SFB take steps to reactivate from a different location. The Bureau frequently grants STA allowing licensees that have lost sites to resume operations with temporary, generally lesser facilities until it is possible to restore licensed service. In this manner, some portion of the population within a station's listening area receives service and the station's license does not terminate under Section 312(g). SFB's pursuit of an STA to remain silent but not of an STA to reactivate with alternate facilities supports a finding that the foreclosure contributed little, if at all, to WTTT's silence.

Accordingly, the May 7, 2012 Request for Reinstatement or Tolling by Silver Fish, Inc., IS DENIED. The April 13, 2011 Petition for Reconsideration by White Mountain Broadcasting, LLC IS DISMISSED AS MOOT.

To the extent that any equipment might remain at the tower site, it would be imperative to the safety of air navigation that any prescribed painting and illumination of the station's tower be maintained. The owner of any tower where SFB's transmitting antenna was located would be required, pursuant to

¹⁵ See *A-O Broadcasting Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 603, 617 (2008) (site loss due to licensee's own rule violations and continued silence due to failure to complete construction at alternate site); *ETC Communications, Inc.*, Letter, 25 FCC Rcd 10686, 10689 (MB 2010) (decision not to operate financially struggling station while offering it for sale); *Family Life Ministries, Inc.*, Letter, 23 FCC Rcd 15395 (MB 2008) (station deactivated for economic reasons within licensee's control); *Kirby Young*, Letter, 23 FCC Rcd 35 (MB 2008) (licensee not financially able to restore operations after transmitter failed); *Zacarias Serrato*, Letter, 20 FCC Rcd 17232 (2005) (business decision not to obtain an alternate site promptly).

¹⁶ Moreover, we believe that it is most appropriate to exercise our Section 312(g) discretion to reinstate when the outcome of the relevant appeal changes the *status quo*, such as if the licensee's prevailing on appeal removes an obstacle that had previously made it impossible to return to the air. *Cf.*, *Peninsula Communications, Inc.*, Memorandum Opinion and Order, 20 FCC Rcd 11408, *aff'd*, 20 FCC Rcd 16919 (2005) (Section 312(g) language concerning reinstatement for stations in Alaska suggests that Congress intended to effectuate a change in pre-existing administrative decisions.) In the instant case, SFB could have operated pursuant to its license for the duration of the administrative proceeding, and its operating authority would not have changed if SFB prevailed.

¹⁷ *Cf.*, *Wendell & Associates*, 17 FCC Rcd 18576, 18579 (2002) (rejecting broadcast permittee's argument that terrorist attacks of 9/11 formed a basis for waiver when causal link to permittee's failure to complete construction was weak and the primary cause was permittee's own business judgment).

¹⁸ Compare *V.I. Stereo*, 21 FCC Rcd at 14259 (licensee rebuilt station, but it was destroyed again).

Section 303(q) of the Communications Act of 1934, as amended,¹⁹ to maintain the tower in the manner prescribed by our rules and the terms of the expired License and Permit until dismantled.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹⁹ 47 U.S.C. § 303(q).